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No. 06-8120

IN THE

SUPREME COURT OF THE UNITED STATES

BRUCE EDWARD BRENDLIN,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari

To the California Supreme Court

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a passenger in a vehicle subject to a traffic stop is thereby "detained" for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop.

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO WRIT OF CERTIORARI	1
ARGUMENT	2
CONCLUSION	9

TABLE OF AUTHORITIES

Page

Constitutional Provisions

Cases

Florida v. Bostick, 501 U.S. 429, 115 L.Ed.2d 389, 111 S.Ct. 2382 (1991) 6

People v. Brendlin, 38 Cal.4th 1107, 136 P.3d 845, 45 Cal.Rptr.3d 50 (2006) 2, 3

United States v. Ameling, 328 F.3d 443 (8th Cir. 2003) 3

United States v. Crews, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980) 7

United States v. DeLuca, 269 F.3d 1128 (10th Cir. 2001) 5

United States v. Drayton, 536 U.S. 194, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002) 6

United States v. Gama-Bastidas, 142 F.3d 1233 (10th Cir. 1998) 3

United States v. Grant, 349 F.3d 192 (5th Cir. 2003) 3

United States v. Guevara-Martinez, 262 F.3d 751 (8th Cir. 2001) 7, 8

United States v. Mosley, 454 F.3d 249 (3rd Cir. 2006 3-5, 7, 8

United States v. Sowers, 136 F.3d 24 (1st Cir. 1998) 3

United States v. Twilley, 222 F.3d 1092 (9th Cir. 2000) 3

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) 7

Other Authorities

6 Wayne R. LaFave, Search and Seizure § 11.3 (4th ed. 2004) 3

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In this reply, Petitioner will limit discussion to the argument raised by respondent in the opposition to the petition for writ of certiorari. Petitioner does not intend to belabor points already addressed in the petition itself.

ARGUMENT

Respondent urges this court to deny the petition for writ of certiorari because the evidence seized during the traffic stop was "not sufficiently connected to the allegedly illegal traffic stop." Resp. to Petn. at 7.[1] Respondent argues that Petitioner was "free to go once the stop had been effectuated," and that Petitioner's subsequent arrest and the ensuing search of the vehicle were the result of a continuing consensual encounter. Resp. to Petn. at 7.

Respondent presents the assertion that Mr. Brendlin was free to go once the car had come to a stop as if it were an unassailable conclusion, but in fact three members of the California Supreme Court expressly disagreed with that premise. As Justice Corrigan stated in her dissenting opinion, in which she was joined by two other justices,

> Passengers in a vehicle pulled over for a traffic stop are not free to leave, in either a practical or a constitutional sense. Certainly no one can safely leave the vehicle before it stops. Once it has pulled over, the officer has the authority, as a matter of law, to order that the passengers remain inside (*People v. Castellon* (1999) 76 Cal.App.4th 1369, 1374-1375 [91 Cal. Rptr. 2d 204]), or get out of the vehicle (*Maryland v. Wilson* (1997) 519 U.S. 408, 410 [137 L. Ed. 2d 41, 117 S. Ct. 882]). This authority is soundly based on the need to protect the officer's safety. One of its necessary consequences, however, is that the passengers, having been forced to interrupt their journey, are deprived of further freedom of movement.

People v. Brendlin, 38 Cal.4th 1107, 1123-1124, 136 P.3d 845, 45 Cal.Rptr.3d 50 (2006) (Corrigan, J., dissenting). Justice Corrigan went on to state that she "would hold that passengers are 'seized' from the time a car is pulled over until the officer ends the restraint on their liberty, either by telling them they are free to leave or by releasing the occupants of the vehicle after completing the traffic stop." *Id.,* 38 Cal.4th at 1126.

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[1]Respondent refers to the traffic stop as "allegedly illegal," but Respondent did not dispute in the California Supreme Court that the officer lacked reasonable suspicion to justify the traffic stop. *People v. Brendlin*, 38 Cal.4th 1107, 1114, 136 P.3d 845, 45 Cal.Rptr. 3d 50 (2006).

Nor are the federal circuits in agreement with Respondent's position. As already discussed in the original petition, the federal circuit courts to have considered the issue have unanimously held that a passenger is detained by virtue of a traffic stop and may challenge the fruits of that search. *See, e.g., United States v. Grant*, 349 F.3d 192 (5th Cir. 2003); *United States v. Ameling*, 328 F.3d 443 (8th Cir. 2003); *United States v. Twilley*, 222 F.3d 1092, 1095 (9th Cir. 2000); *United States v. Gama-Bastidas*, 142 F.3d 1233 (10th Cir. 1998); *United States v. Sowers*, 136 F.3d 24 (1st Cir. 1998); *see also* 6 Wayne R. LaFave, Search and Seizure § 11.3 (4th ed. 2004). More importantly, no circuit has adopt Respondent's simplified approach to the attenuation issue, i.e., that a passenger's detention ceases as soon as the vehicle comes to a stop, rendering all subsequent contact between the passenger and law enforcement "consensual," and thus attenuating the taint of the initial stop.

A Third Circuit panel applied a simple "but-for" test to determine whether evidence seized after an illegal traffic stop was admissible against a passenger. *United States v. Mosley*, 454 F.3d 249, 268 (3rd Cir. 2006). Under that test, if the evidence would not have been discovered absent the illegal traffic stop, it cannot be used against either the driver or any passengers unless the government establishes "one of the traditional exceptions" to the fruit of the poisonous tree rule: attenuation, inevitable discovery, independent source, or some intervening act or event sufficient to purge the taint of the illegal stop. *Id.* at 269.

Applying the *Mosley* test to the facts of this case, had the officer not made the illegal traffic stop, he would have had no occasion to look into Mr. Brendlin's parole status, would not have arrested Mr. Brendlin, and would not had reason to search the car incident to Mr. Brendlin's arrest. Thus, the discovery of the seized evidence had a clear

"but-for" connection to the illegal traffic stop. Respondent asserts that this case falls under an exception to the *Mosley* "but-for" test because of the existence of the outstanding warrant and the existence of "consensual" contact between the officer and Mr. Brendlin after the traffic stop. Resp. to Petn. at 14. The existence of the warrant, however, does not change the direct causal connection between the illegal traffic stop and the discovery of contraband in the car as a result of that stop; moreover, as already noted, the officer would not have discovered the existence of the outstanding warrant if not for the illegal traffic stop. Furthermore, as discussed above, the allegedly "consensual" nature of the contact between Mr. Brendlin and the officer is an issue open to some dispute, an issue that is entirely dependent upon whether the traffic stop constituted a *continuing* illegal seizure of both the driver and Mr. Brendlin.

Moreover, the question of what factual or causal relation test should apply to determine when to suppress evidence seized as the result of an illegal stop is something of a disputed question among the federal circuits. In adopting the "but-for" test, the *Mosley* court rejected the more stringent test applied by the District Court in that case, a test derived from the Tenth Circuit decision in *United States v. DeLuca*, 269 F.3d 1128 (10th Cir. 2001). Applying that test, the District Court looked for a "factual nexus" between the violation of the passenger's rights and the discovery of the evidence. Specifically, the court posed the question of whether, had the passenger "asked for and received permission to leave the scene immediately after the car was stopped, the evidence in the car would still have been discovered." *United States v. Mosley, supra,* 454 F.3d at 254. Under the *DeLuca* test, if the answer to the question is that the evidence still would have been discovered even had the passenger been allowed to leave, then the causal connection between the passenger's detention and the discovery of the evidence is too attenuated to

permit the passenger to move to suppress that evidence. *Id.*; *see also United States v. DeLuca, supra,* 269 F.3d at 1134.

Although the Third Circuit rejected the factual nexus test as too stringent and inappropriately applied in a case in which the passenger challenged the initial traffic stop, it is worth noting that even under the factual nexus test, Mr. Brendlin would be entitled to suppression of the seized evidence. Had Mr. Brendlin requested and been granted permission to leave the premises, then he would not have been arrested, and the search of the car incident to his arrest would not have occurred. Thus, even under the strict factual nexus test, Mr. Brendlin would be entitled to suppress the fruits of the traffic stop.

Respondent's reliance on this Court's holding in *United States v. Drayton*, 536 U.S. 194, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002) is misplaced. In that case, this Court merely applied the holding in *Florida v. Bostick*, 501 U.S. 429, 115 L.Ed.2d 389, 111 S.Ct. 2382 (1991) to a similar case involving officers boarding a bus, holding that officers need not expressly advise passengers of their right to refuse to cooperate. Respondent appears to rely on the facts of that case to support his argument that because the officer in this case did not make any order to the contrary, Mr. Brendlin was free to leave once the car came to a stop:

> The officers gave the passengers no reason to believe that they were required to answer the officers' questions. When Officer Lang approached respondents, he did not brandish a weapon or make any intimidating movements. He left the aisle free so that respondents could exit. He spoke to passengers one by one and in a polite, quiet voice. Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter.

United States v. Drayton, supra, 536 U.S. at 203-204. The facts of *Drayton* are entirely distinguishable from the instant case, however, because as in *Florida v. Bostick*, no argument was made that the bus was illegally detained. Rather, the bus was halted at a

regular stopover, and police took the opportunity to board the bus and question passengers. *Id.* at 197-198. The rationale of that case is not applicable to a situation in which a traffic stop is illegal from its inception. *Cf. United States v. Mosley, supra,* 454 F.3d at 255.

Respondent further relies on this Court's holding in *United States v. Crews*, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980) as authority for the argument that the discovery of Mr. Brendlin's parole status was sufficiently attenuated from the traffic stop to eliminate the factual nexus. The factual scenario in *Crews* is entirely distinguishable from the case at bar, however. There, this Court held that a crime victim's in-court identification of a defendant was not the result of illegal police conduct. In so holding, the Court reviewed the in-court identification under the test articulated in *Wong Sun v. United States*, 371 U.S. 471, 487-488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963): "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" After looking at the unique circumstances of an in-court identification, the Court held that the identification was not the result of exploitation of the illegal arrest. *United States v. Crews, supra,* 445 U.S. at 472-473.

A more apposite case is *United States v. Guevara-Martinez*, 262 F.3d 751 (8th Cir. 2001), in which an Eighth Circuit panel held that where an illegal traffic stop led to a passenger's arrest and ultimately to a confession of immigration violations, the Fourth Amendment required suppression of the confession as well as the passenger's fingerprints, because officers had obtained the statements and fingerprints "by exploiting his unlawful detention, instead of by means sufficient to have purged the taint of the

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: January 12, 2007

Respectfully submitted,

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